



In re Estate of Shadrack Shitseswa Mukoya (Deceased) (Succession Cause 258 of 1994) [2025] KEHC 5616 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 258 OF 1994
SC CHIRCHIR, J
APRIL 29, 2025**

IN THE MATTER OF THE ESTATE OF SHADRACK SHITSESWA MUKOYA (DECEASED).

BETWEEN

ALI OMETTY SHITSESWA PETITIONER

AND

SELINA GWALA MUKOYA 1ST OBJECTOR

ELIZABETH N JUMA 2ND OBJECTOR

AND

SAMSON N SIAMBIRI INTERESTED PARTY

RAJAB SIAMBIRI INTERESTED PARTY

GERALD MUKOBI SIAMBIRI INTERESTED PARTY

LAWRENCE M SIAMBIRI INTERESTED PARTY

SHEM LUSAMAMBA INTERESTED PARTY

JUDGMENT

1. What is coming up for determination are the summons for confirmation of Grant dated 20/1/2021 and the protest dated 10/3/2021 and 18/3/2021. The summons is supported by the affidavit of Ali Ometty Shitseswa (The Petitioner).

The petitioner's case

2. He petitioner states that the deceased was survived by 3 widows one of whom has died ,and thirteen (13) children, some of whom are also deceased.



3. He further states that the estate is compromised of land parcel No. Butsotso/Ingotse/651 measuring approximately 57 acres. The mode of distribution proposed is set under paragraph 4 of his affidavit.
4. He states that the objectors should move the environment and land court in respect to their claims against the estate.
5. Gerald Mukobia Siambiri (the 3rd interested party), filed a protest on 14/3/2021. He has deposed that he is swearing the affidavit on behalf of the 1st, 2nd and 4th interested parties. It is the protestor's case that their father one Juma Siambiri had purchased 7 acres from the deceased, and later the Administrator, Elijah Shitseswa Mukoya (now deceased) sold another 4 acres to their father. He states that they have been in occupation for the last 40 years and therefore they are claiming the aggregate of 11 acres, under the doctrine of adverse possession.
6. Another protest , dated 10/3/2021 was filed by Elizabeth Juma (The 2nd objector).She states that she is the daughter of the deceased; that the deceased had 1 wife and 10 children, particulars of which she has listed under paragraph 2 of her affidavit; that the deceased had a large piece of land which he distributed to his sons at the time of adjudication between 1968 and 1975. He registered them under the names of the said sons as follows:
 - a). Parcel No. 650 (7 acres) – to Elijah Mukoya
 - b). Parcel No. 652 (8 acres) – to Raydon Mukoya
 - c). Parcel No. 653 (5 acres) – to Isaac Mukoya
 - d). Parcel No. 654 (10 acres) to David mukoya
7. All the parcels are under the same registration section, that is , ,Butsotso/Ingotse and the certificates of official searches are attached. She further states that her father was left with parcel No. Butsotso/ Ingotse/651 measuring 57 acres. This is the property that forms the subject matter of these proceedings(Suit property).
8. She protests that the deceased's daughter were not provided for, that parcel No. 651 should be shared by the daughter of the deceased as all her brothers had been provided for. She denies that any portion of the any portion of the suit property had been sold to the 3rd interested party's father.
9. The hearing proceeded by way of oral hearing.
10. The 1st witness was the petitioner. He substituted his father, one Elijah Shitseswa, who was the 1st Administrator , and who died in the course of these proceedings. He told the court that the 2nd objector and the rest of his sisters should get an aggregate of 8 acres; that indeed she had earlier agreed to the 8 acres. He further stated that parcel Nos. 650, 653, 652 and 654 were not in the name of the deceased and were therefore not available for distribution. He denied any sale of the property to the 1st to 4th interested parties.
11. On cross- examination, he stated that the proposed of 8 acres was based on the 2nd objector's earlier proposal. He admitted that his deceased father owned parcel owned parcel No. 650 but he did not know how his father acquired it. On further cross- examination, he stated he was not aware of the existence of any sale agreement and if such an agreement was valid.
12. PW2 was a retired senior Assistant Chief of Ingotse. He relied on his written statement. On cross - examination, he stated that he knew the deceased who was his relative; that the deceased had 5 daughters and 4 sons. He was not aware if the deceased had distributed his property . He stated that none of the



sons is residing in parcel No. 651. He further told the court that that elders held a meeting with the family and gave the daughters 8 acres, based on the request of the 2nd objector.

13. On further cross -examination he stated that as an Assistant -Chief he would have known if any of the deceased's land was being sold. He stated that ordinarily, an agreement of such sale ought to have been brought to him to counter- sign. He insisted that Juma Siambiri , the father of the interested parties , had not bought the land , but he had leased it from the deceased; that he was Juma's neighbor ,and used to see him occasionally harvesting maize.
14. The next witness was Perise Nakumicha, a daughter of the deceased. She told the court that she was not claiming a share in the estate as they would be depriving their brothers land. She disagrees with the 2nd objector's proposal and indicate her support for that of the petitioner.

The objector's case

15. The 1st witness was Harriet Ngamita, a granddaughter to the deceased, and daughter to Selina Khatsunzie who died on 12/6/2021. She stated that she has siblings; that her mother was aware about the case, and had expressed her wish to get a share of the estate. She opposed the petitioner's proposal. She admitted that she had not taken out representation for her mother's estate.
16. DW2, was the daughter-in -law of the deceased and wife to Isaiah Mukoya, the son of the deceased. She produced certificates of official searches for parcel Nos. 654,653,650 and 652. She stated that the sons got land directly from the government and were not given to them by the deceased. She stated that the 1st to 4th interested parties were leasing the deceased's land. It was not a sale.
17. The 2nd objector was the next witness. She told the court that the deceased had 10 children but 7 of them have since died. That the deceased had shared out his land; that parcel Nos. 650, 652, 653 and 654 were given to the sons by the deceased, during the adjudication period. She insisted that one Diana Ongeche was the deceased's girl friend and not a wife, but she had a child with the deceased.. She stated that the suit property should be shared equally. She denied knowledge of any existing claims on based on purchase.
18. Petronila Nechesa testified and stated that the deceased was her grandfather and she is the child of child of Elijah Muketu. Her father had 3 wives namely Rosilo, Feride and Hadija.

The interested parties case

20. The 1st protestor witness was one Gerald Siambiri. He stated that his father had bought land from the deceased. That 7 acres was sold to his father in 1984; that later ,Elijah (the deceased Administrator), sold another 4 acres to his father. They have been in occupation since 1983.
21. On cross- examination, he stated that the deceased entered into an agreement with his father Jumba Siambiri. That his father died on 5/6/2017. He further stated that he is also claiming the 11 acres under the doctrine of adverse possession.
22. The hearing concluded and thereafter the parties filed submissions which I have considered.

Analysis and determination

23. I have considered the pleadings; the oral evidence and parties' submissions and I have identified the following issues for determination.
 - a. Whether the interested parties are creditors to the Estate



- b. Whether there are gifts *intervivos*?
- c. How should the estate be distributed?

Whether the interested parties are creditors to the estate.

- 24. The 1st to 4th interested parties are claiming a share of 11 acres from parcel No. 651 based on an agreement which is reported to have been signed between the deceased and their father, Jumba Sambiri. They have produced an agreement for sale. They also state that four of those 11 acres were sold by the Administrator, one Elijah, then the Administrator of the deceased's estate. They submit that they have been in occupation of the purchased portion for the last 40 years, and therefore they also have a claim against the deceased's estate under the doctrine of adverse possession.
- 25. This court, as a family court, is mandated to only give effect to third party interests, like the interested parties herein, which had crystallized at the time of the deceased's demise. These are interests acknowledged by the Administrators of an estate, and are not under any contest.
- 26. The sale agreement, which the interested parties have sought to rely on is being contested by the petitioners and the heirs of the deceased. It follows that the validity of the said agreement(s) need to be interrogated.
- 27. Sale agreements on purchase of land are issues touching on title to land. Any contestations touching on title to land, including whether the title to land has been acquired through the principle of adverse possession, is adjudicated by the Environment and land court or the designated chief magistrate's court.
- 28. Further, Article 165 (5) (b) of *the constitution* expressly bars the high court from hearing matters reserved for the courts set up under Article 162(2). One of the courts set up under the latter Article, includes the Environment and Land court.
- 29. In a nutshell, this court does not have jurisdiction to adjudicate on the validity of the transactions entered into by the deceased and third parties.
- 30. The purported sale of four acres by the administrator was done prior to the confirmation of grant. Pursuant to the proviso to section 82(b) such a sale was void as an Administrator has no power to sell the deceased's immovable properties prior to the confirmation of grant.

Whether there existed gift's *intervivos*

- 32. It is the 2nd objector's case that her brothers had been given land by the deceased; that the land was given to them at the time of adjudication and duly registered in their names, and therefore they should not benefit from the suit property.
- 33. The parcels in question are parcel Nos:650, 652, 653 and 654 given to Elijah Mukoya, Raydon Mukoya, Isaiah Mukoya and David Mukoya respectively. I have seen copies of the registers for all the above stated parcels. They are registered in the names of the sons of the deceased. The parcels were registered in October 1968 and they were first registration.
- 34. Thus, there is no documentary evidence at all that the deceased had owned these properties, so as to pass them to his sons as gifts. The petitioner has stated that he does not know how his father and his uncles acquired the parcels. However, the onus of proof in this regard was on the 2nd objector to prove that stated parcels of land were gifts *intervivos* from the deceased.
- 35. I am not satisfied that on a balance of probabilities, the 2nd objector has proved that her brothers had benefited from the deceased's Estate.



Distribution of the Estate

35. The petitioner states that the deceased had three wives while the 2nd objector insist that there was one. Whether there was one or more , it is common grounds that none of the deceased’s spouse(s) are still alive. Some of the children have died leaving behind their own children. The mode of distribution therefore is in accordance to Section 38 of the Law of Succession Act. The section provides as follows; “Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
36. The law of Succession Act makes no distinction between the male and female heirs of the deceased. Thus the proposal by the Petitioner, to the extent that it proposes an acreage of 8 to be shared by the daughters, is discriminatory against female heirs. Such a proposal would also run afoul Article 27 (4) and (5)5 which prohibits discrimination on the basis of inter alia sex or marital status, in any event. Thus, same for peris Nakumicha who renounced her share under oath, the deceased daughters are get a share of the estate on equal basis as their brothers.
38. The only property in the name of the deceased is Land Parcel No. Butso/Ingotse/651. The certificate of official search record indicate that it is 57 acres.
39. Some of the deceased heirs have since died and there is no indication that representation have been made in respect to their estates. In the circumstances, their portion will be allocated ,not to their named children, but to their estates.
40. In conclusion, I hereby proceed to make orders as follows;
- a. The protest by the 1st, 2nd, 3rd, and 4th protestors is hereby struck off.
 - b. The Land Parcel going by title No. Butso/Ingotse/651 shall be distributed as follows;
 1. The Estate of Roseland Masinga – 6.3 Acres.
 2. The Estate of Rebecca Bichondo – 6.3 Acres
 3. Elizabeth N. Jumo – 6.3 Acres
 4. The Estate of Elijah S Mukoya – 6.3 Acres
 5. Sily Anyone – 6.3 Acres
 6. The Estate of Isaya Mukoya – 6.3 Acres
 7. The Estate of Raydance Mukoya – 6.3 Acres
 8. The Estate of David O Mukoya - 6.3 Acres
 9. The estate of Selina Khatsenzia – 6.3 Acres
 - c. The Grant of Letters of Administration is confirmed on terms of (b) above.
 - d. Each party to meet their own costs.
 - e. Right of Appeal- 28 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 29TH DAY OF APRIL 2025
S. CHIRCHIR



JUDGE.

In the presence of:

Godwin Luyundi – Court Assistant

Mr. Nanjala for Mr. Akwala for the petitioner

Ms. Munihi for the 1st Objector

Ms. Nafuye for Mr. Getanda for the 2nd Objector

Mr. Iddi for the interested parties.

